Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO., *Petitioner*

v.

THE UNITED STATES, *Respondent.*

**On Writ of Certiorari to the United States Court of Claims**

## BRIEF OF AMICUS CURIAE. THE AMERICAN CHEMICAL SOCIETY

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## BRIEF OF AMICUS CURIAE, THE AMERICAN CHEMICAL SOCIETY

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### PRELIMINARY STATEMENT

The American Chemical Society submits this brief as *amicus curiae*, urging that the November 27, 1973 Order and Decision of the United States Court of Claims be reversed. The letters of counsel for the Petitioner and Respondent stating their consent to the filing of this brief are set forth in Appendices A and B herein.

## INTEREST OF THE AMICUS CURIAE

The American Chemical Society is a non-profit, scientific and educational membership corporation founded in 1876 as a New York corporation. The Society is the largest single organization for chemists and chemical engineers in the United States with a current membership of approximately 110,000.

The Society was reincorporated by an Act of Congress in Public Law No. 358, 75th Congress, Chapter 762, 1st Session, H.R. 7709, signed into law by President Franklin D. Roosevelt on August 25, 1937, to become effective from the first day of January, 1938. The Society is exempt from the payment of federal income taxes under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended. The objects of the Society as set forth in Section 2 of its charter are as follows:

> "*That the objects of the incorporation shall be to encourage in the broadest and most liberal manner the advancement of chemistry in all its branches; the promotion of research in chemical science and industry;* the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; *the increase and diffusion of chemical knowledge; and by its* meetings, professional contacts, *reports, papers,* discussions, *and publications, to promote scientific interests and inquiry,* thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people." (emphasis supplied)

One of the principal objects of the Society is the dissemination of chemical knowledge through its publications program. The budget for the Society for the



year 1974 exceeds $39,000,000, of which more than $32,000,000 is devoted to its publications program.

The Society's publications now include twenty periodicals varying from scholarly journals containing reports of original research in such fields as medicinal chemistry, biochemistry, and agricultural and food chemistry, to a weekly newsmagazine designed to keep chemists and chemical engineers abreast of the latest developments affecting their science and profession. In addition, the Society is the publisher of CHEMICAL ABSTRACTS, the world's most comprehensive scientific abstracting and indexing service. The funds to support these publications are derived chiefly from subscriptions by the Society's members.

The Society's publications and their periodicity of publication, circulation, and the cost to subscribers, as of January 1, 1974, are as follows:

| Publication | Periodicity of Publication | Circulation | Rates Members | Rates Non-Members |
|---|---|---|---|---|
| Chemical Abstracts | Weekly | Company & Individual 3,170 | | $2,900.00 |
| | | Universities 2,408 | | 2,400.00 |
| Constituents & Derivatives of Chemical Abstracts | No set schedule | In excess of 12,000 | | Range from 35.00 to 100.00 |
| Journal of American Chemical Society | Bi-weekly | 15,613 | $22.00 | 66.00 |
| Chemical & Engineering News | Weekly | 121,562 | 5.00 | 9.00 |
| Analytical Chemistry | Monthly | 30,898 | 5.00 | 7.00 |
| The Journal of Physical Chemistry | Bi-weekly | 5,262 | 20.00 | 60.00 |

| Publication | Periodicity of Publication | Circulation | Rates Members | Rates Non-Members |
|---|---|---|---|---|
| Journal of Agricultural and Food Chemistry | Bi-monthly | 4,885 | 10.00 | 30.00 |
| The Journal of Organic Chemistry | Bi-weekly | 9,067 | 20.00 | 60.00 |
| Journal of Chemical and Engineering Data | Quarterly | 2,144 | 15.00 | 45.00 |
| Journal of Chemical Documentation | Quarterly | 1,946 | 7.00 | 21.00 |
| Biochemistry | Bi-weekly | 6,711 | 20.00 | 60.00 |
| Inorganic Chemistry | Monthly | 5,000 | 18.00 | 54.00 |
| Journal of Medicinal Chemistry | Monthly | 3,914 | 15.00 | 45.00 |
| Chemical Reviews | Bi-monthly | 5,581 | 13.00 | 39.00 |
| Chemistry | Monthly | 32,165 | 6.00 | 6.00 |
| I&EC Process Design and Development | Quarterly | 6,672 | 7.00 | 21.00 |
| I&EC Fundamentals | Quarterly | 6,702 | 7.00 | 21.00 |
| I&EC Product Research and Development | Quarterly | 6,763 | 7.00 | 21.00 |
| Environmental Science And Technology | Monthly | 26,408 | 6.00 | 9.00 |
| Macromolecules | Bi-monthly | 2,307 | 12.00 | 36.00 |
| Chemical Technology | Monthly | 13,537 | 9.00 | 18.00 |
| Accounts of Chemical Research | Monthly | 11,588 | 7.00 | 21.00 |



Additionally, the Society publishes on a non-periodical basis the following:

Directory of Members

Abstracts of Meeting Papers

Advances in Chemistry Series

Seidell's Solubilities of Inorganic and Organic Compounds

Specifications and Test Methods for Laboratory Reagent Chemicals

Collective Indexes to Chemical Abstracts and Society Journals

Such other books, pamphlets, and reprints as may be authorized by the Board of Directors.

The twenty primary periodical publications of the Society produce more than 43,000 pages a year, and CHEMICAL ABSTRACTS produces more than 127,000 pages a year. Its abstracts number in excess of 380,000 annually and its documents indexed in excess of 410,000.

The journals and other published writings of the Society, in accord with the Society's Federally chartered objectives, serve a most important function—the increase and diffusion of chemical knowledge. Revenues generated by these publications permit the Society to support and continue its publications program in furtherance of its chartered objectives by promoting scientific interest in the field of chemistry. The protection of copyright has been an important factor in the growth and development of the scientific publications program of the Society.

The Society therefore has a deep and abiding interest in the outcome of this case. The promotion of re-

search in chemical science and industry requires the most effective possible dissemination of information. In order to accomplish this objective, the Society, operating as a non-profit organization, seeks to provide the best possible means of collecting chemical knowledge and of disseminating that knowledge to those who need and use it. The Society endeavors to maintain the unit cost of its publications at a level which will encourage their use throughout the scientific community. It should be recognized that the considerable expense of the Society's publications program must be met in full. If libraries are permitted to photocopy the Society's copyrighted scientific articles for use by researchers without paying royalties and/or license fees, users will not subscribe to the Society's publications. The result will be a reduction in paid circulation and a smaller base over which to distribute the expenses of the publications program, driving up unit costs to unacceptable levels. Such appreciable increases in cost would defeat the Society's efforts to maintain the broad and effective distribution of its publications.

The Society therefore urges that the systematic library reproduction of copyrighted scientific articles without permission of or payment to the publisher will have a deleterious effect on the dissemination of chemical knowledge and on efforts to promote scientific research in the field of chemistry.

## ARGUMENT

The Williams & Wilkins Company, the petitioner herein, asserts that the systematic reproduction of journal articles by a central research library or library system constitutes a copyright infringement under the



copyright laws of the United States, which provide in pertinent part as follows:

> "§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right;
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;"
>
> * * *
>
> "§ 3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED: COMPOSITE WORKS OR PERIODICALS.—The copyright provided by this title shall protect all the copyrightable components of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title." 17 U.S.C. §§ 1(a), 3 (1970).

The petitioner, primarily a medical publisher, has charged that the Department of Health, Education and Welfare, through the National Institutes of Health (NIH) and the National Library of Medicine (NLM) has infringed its copyrights by making repeated unauthorized photocopies of entire articles from its copyrighted journals. The petitioner initiated this action to recover reasonable compensation for copyright infringement under 28 U.S.C. § 1498(b), which consents to infringement suits against the United States and vests exclusive jurisdiction over such suits in the Court

of Claims. The statute provides in pertinent part as follows:

> "Hereafter, whenever the copyright in any work protected under the copyright laws of the United States shall be infringed by the United States * * * the exclusive remedy of the owner of such copyright shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation * * * *"

An extensive trial was held before Trial Judge James F. Davis who decided that the Government was liable for infringement. On review the Court of Claims, in a 4-3 decision, rejected the opinion of the Trial Judge and held that the petitioner was not entitled to recover. Your amicus supports the position of the petitioner and urges that the decision of the Court of Claims be reversed and remanded with directions to adopt the Trial Judge's opinion, findings of fact, and recommended conclusions of law as a basis for a judgment in favor of the petitioner.

This action is based upon the reproduction of petitioner's copyrighted articles by means of a comprehensive photocopying system whereby NIH and NLM, relying generally on one or two subscriptions to a journal, regularly fill the requests of library users for journals of the petitioner and other publishers by photocopying the requested journal articles. This photocopying system is an integral part of the NIH and NLM library operations.

The demand by research workers at NIH for access to journals is not met by in-house subscription copies. The NIH library therefore runs a photocopying service which provides copies of journal articles for the



NIH research staff, some twelve thousand in number. On request, a researcher can obtain a photocopy of an article from any of the journals in the library's collection. The library does not monitor the reason for requests or the use to which photocopies are put. The photocopies are not returned to the library and are apparently retained by researchers for whatever use they may desire. The record reveals that in 1970, the NIH library filled 85,744 requests for photocopies of journal articles, consisting of approximately 930,000 pages. (emphasis supplied)

NLM is a "librarians' library," which as part of its operation cooperates with other libraries and like research oriented institutions in an interlibrary loan program. Upon request, NLM will loan to other libraries, Government institutions, schools, hospitals, private physicians and to some extent to drug companies and other private enterprises, books and other materials from its collection. In the case of journals, NLM furnishes photocopies of the desired articles instead of lending the original. These photocopies are supplied by NLM free of charge and on a no-return basis. Users are therefore able to acquire free photocopies of copyrighted articles from NLM. The record discloses that in 1968 about 12,000 requests were filled by photocopying single articles from journals.

The Copyright Act of 1909, which governs this case, provides that the copyright owner has the exclusive right to print, publish and copy the copyrighted work. This right is subject to a judicially created right of "fair use," which depends on an evaluation of varying factors which bear on each case. The application of the doctrine of fair use depends on a case-by-case examina-

tion of the following: (a) the purpose and character of the use, (b) the nature of the copyrighted work, (c) the amount and substantiality of the material used in relation to the copyrighted work as a whole, and (d) the effect of the use on a copyright owner's potential market for and value of his work. *Williams & Wilkins Co.* v. *United States,* 487 F.2d 1345, 1352 (Ct. Cl. 1973).

Taking these factors into account, the majority of the Court of Claims denied the petitioner's request for reasonable compensation for the infringement of its copyright, concluding that "on this record, the challenged use should be designated 'fair' and not 'unfair.'" 487 F.2d at 1353. The Court set forth three propositions upon which it based its decision—first, the petitioner is not being substantially harmed by the photocopying practices in question; second, medicine and medical research will be injured by holding these practices to be an infringement; and, third, until a legislative solution is forthcoming, the Court should not place the risk of harm upon science and medicine. 487 F.2d at 1354. The Court, in an attempt to accommodate the interests of science with those of publishers and authors, sought to protect and promote the progress of science and medicine. Your amicus contends that the Court's decision, if allowed to stand, will have just the opposite effect and will, in fact, retard progress in the sciences.

In reaching its decision, the Court held that the petitioner failed to prove that photocopying would have a serious adverse impact on the potential market for its copyrighted journal articles. The Court concluded that the petitioner (together with "medical publishers generally") has not been substantially harmed by the



photocopying practices in question and that there was no evidence to show specifically that unauthorized photocopying has resulted in the loss of revenue to the petitioner or to publishers generally. 487 F.2d at 1359. However, the Trial Judge found that it was not unreasonable to infer from the evidence that extensive unauthorized copying has resulted in some loss in revenue and that it served to diminish the potential market for the original articles. In his able dissenting opinion, Chief Judge Cowan points out that since the inferences made by the Trial Judge may reasonably be drawn from the facts and circumstances in evidence, they are presumptively as correct as his findings of fact. *See Bonnar* v. *United States,* 194 Ct.Cl. 103, 109, 438 F.2d 540, 542 (1971). Accordingly, under the standards employed by the Court of Claims for reviewing the findings of trial judges, the Court should have adopted those findings. *Davis* v. *United States,* 164 Ct.Cl. 612, 616-17 (1967); *Wilson* v. *United States,* 151 Ct.Cl. 271, 273 (1960).

The very nature of an action for infringement places a heavy burden on the copyright owner to show that unauthorized photocopying results in some loss of revenue or serves to diminish the potential market for the original article. However, it is well established that proof of actual damage is not required and that the defense of "fair use" may be overcome where potential injury is shown. *See, e.g., Henry Holt & Co., Inc.* v. *Liggett & Meyers Tobacco Co.,* 23 F.Supp. 302, 304 (E.D.Pa. 1938). The instant dispute presents an example of unauthorized wholesale machine copying and wide distribution of copyrighted material to users "on a scale so vast that it dwarfs the output of many small

publishing companies." *Williams & Wilkins Co.* v. *United States,* 487 F.2d at 1364 (dissenting opinion of Cowan, C.J.). The photocopying services do not involve the minor sporadic copying of portions of scientific articles, but rather the copying of entire articles for free distribution to whoever requests them. The photocopies are substitutes for and serve the same purpose as the original articles. It follows that the unauthorized copying of a substantial number of copyrighted articles supplants the need for journal subscriptions. The judicially created doctrine of "fair use" should therefore not be extended to cover this type of massive copying and distribution operation.

In holding that the systematic reproduction of journal articles by a central research library is not a copyright infringement under the laws of the United States, the majority relies on the stated practice of some foreign countries in deciding that the unauthorized copying in this case is "fair use." 487 F.2d at 1362. The majority's reliance on foreign legislation is misplaced since these laws are markedly different from and often contrary to U. S. copyright law. Even so, the courts of foreign countries have strictly construed the limited right of a user to make copies of copyrighted materials. For example, in *Masson & Cie, et al.* v. *Le Centre National de La Recherche Scientifique* (Le Tribunal de Grande Instance de Paris, January 28, 1974) (France), the court held that the limited right of copying for private use did not extend to the copying and lending practices of a government operated central research library which engaged in large scale photocopying of copyrighted journal articles without permission of, or payment to the publisher.



Flying in the face of the language of the copyright statute, the Court of Claims has placed itself in the position of usurping the legislative authority of the U. S. Congress by totally ignoring the clear meaning of the statute. While claiming that it lacks authority to fashion intermediate or compromise solutions, the Court expressly recognizes that it is essentially acting as an interim legislative body.

> "The truth is that this is now preeminently a problem for Congress * * * * The choices involve economic, social, and policy factors which are far better sifted by a legislature. The possible intermediate solutions are also of the pragmatic kind legislatures, not courts, can and should fashion." 487 F.2d at 1360.

The Court intended its decision to be a " 'holding operation' in the interim period before Congress enacts a preferred solution." 487 F.2d at 1363. It should be noted, however, that Congress has been wrestling with an omnibus copyright revision for the past eighteen years. The House of Representatives has passed a bill, H.R. 2512, 90th Cong., 2d Sess. (1967), and a bill providing for the general revision of the copyright law was introduced in the Senate on March 26, 1973. S. 1361, 93d Cong., 2d Sess. (1973). The Senate bill gives to copyright owners the exclusive rights of reproduction, adaption, publication, performance, and display. S. 1361, 93d Cong., 2d Sess. § 106 (1973). The copyright owner's exclusive rights as set out in Section 106 and as reported to the Senate by the Judiciary Committee on July 3, 1974, are subject to various limitations, qualifications, or exemptions. S. 1361, 93d Cong., 2d Sess. §§ 107-11 (1973). Consequently, notwithstanding the exclusive rights of copyright owners,

Section 108 provides that under certain conditions it is not an infringement of copyright for a library to reproduce or distribute not more than one copy of a work, provided that the following conditions are satisfied:

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage,

(2) the collections of the library are open to the public or available not only to researchers affiliated with the library, but also to other persons doing research in a specialized field, and

(3) the reproduction or distribution of the work includes a notice of copyright.

However, subsection (g) provides that Section 108 does not authorize the systematic reproduction or distribution of copies of copyrighted works.

> "(g) *The rights of reproduction and distribution under this section* extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but *do not extend to cases where the library or archives, or its employees:*
>
> (1) *is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group;* or
>
> (2) *engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d).*" (emphasis supplied)



The purpose of this subsection is to prevent the systematic reproduction or distribution of copyrighted material to other libraries or to groups of users under an arrangement whereby the reproducing library serves as the source of such material. Otherwise, this systematic reproduction or distribution of copyrighted material would remove the need for subscriptions or reprints which users might otherwise save purchased for themselves from the publisher. The Committee Report sets out the following examples to illustrate some of the copying prohibited by subsection (g):

> "(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.
>
> (2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions." S. Rep. No. 93-983, 93d Cong., 2d Sess. (1973).

This long-awaited revision of the copyright law would clearly prohibit the library photocopying practices which are the subject of this dispute.

The majority in the Court of Claims justifies its "holding operation" on the grounds that the record fails to show economic detriment to the petitioner but

does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful.

The petitioner has not undertaken this suit to halt or limit photocopying. It instituted this action in order to recover reasonable compensaion for Government use of its privately copyrighted articles and thereby broaden the financial support for the ever-increasing costs of privately published, scientific journals whose survival is vital to the growth of scientific knowledge.

Unlike the petitioner herein, your amicus is a nonprofit organization whose purposes, as previously set forth, include "the increase and diffusion of chemical knowledge by . . . reports, papers, discussions and publications." Congress has seen fit to encourage such purposes and in furtherance thereof, has extended to the American Chemical Society and like scientific organizations exemption from federal income tax under Section 501(*c*)(3) of the Internal Revenue Code of 1954. It is with this same keen interest in the advancement of the sciences and learning, that Congress enacted the copyright laws. Protection of an individual's copyright was recognized as essential even prior to the assembling of the Constitutional Convention. At that time, twelve of the thirteen colonies, all but Deleware, already had laws to protect the copyright interests of individuals. The copyright law itself recognizes that protection for an individual's endeavors is the *quid pro quo* for progress in learning and the sciences, and without such encouragement, the growth of our scientific knowledge will be stunted. *Omnibus Copyright Revision, Comparative Analysis of the Issues,* Cambridge Research Institute, American Society for Information Science, August 1973. In *Washington Pub. Co.*



v. *Pearson,* 306 U.S. 30, 36 (1954), the Court recognized that these copyrights were "to afford greater encouragement to the production of literary works of lasting benefit to the world." In *Mazer* v. *Stein,* 347 U.S. 218, 220 (1939), the Court stated:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of the individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'science and useful arts.' "

The goals of the American Chemical Society, like the goals of the copyright law, are to encourage progress in science. The scientific works of the Society and other like organizations will be adversely affected by the decision of the Court of Claims, if permitted to stand. A review of the previously listed circulation figures of each of the Society's publications shows that only one of the twenty periodicals enjoys a circulation in excess of 32,000. Fourteen of the twenty publications have a circulation of less than 10,000, and eight have a circulation of less than 6,000. Even a few hundred subscribers lost because of the massive infringing practices of the libraries can affect the unit subscription price of a periodical. This problem can best be seen in the case of the Society's CHEMICAL ABSTRACTS service. There are a total of only 5,578 subscribers to this service. The price is $2,900 per year to companies and individuals and $2,400 per year to universities. It takes little mathematical talent to recognize that photocopying of large portions of these periodicals can be accomplished at a fraction of the cost of a subscription.

The American Chemical Society does not seek to restrict the dissemination of scientific information, for

such dissemination is precisely the purpose of the Society. Its complaint is not the loss of profits to the Society, for the Society makes no profits. The appeal of the Society is to allow it to continue to publish its scientific periodicals and be compensated for their dissemination as required by Congress, so that the proceeds therefrom may be reinvested in further dissemination of scientific knowledge.

The American Chemical Society disseminates more scientific information in the field of chemistry than any other organization. Its accomplishments in this area have been recognized both by Congress and by other branches of government. Its investments are great from the standpoint of both manpower and dollars. Your amicu believes that this program is a vital service which must be continued. The Society is deeply concerned, however, that the unauthorized use of materials under an increasingly liberal "fair use" doctrine could impair, or even destroy, its ability to generate, publish, and disseminate such scientific information. While the Society in no way seeks to hamper or restrict either the learning process or the use of technological developments and equipment needed to improve the exchange of information, it cannot be oblivious to the effects of these developemnts on the essential financial support needed to continue its publications program.

It would be difficult or impossible to obtain accurate figures to indicate precisely the volume of current uncontrolled copying in terms of subscription losses. It can be shown, however, that this problem is particularly acute in the area of chemical publications. In a study of the copying of technical journals from the New York Public Library, five American Chemical Society journals appeared on the list of twenty-two most copied



journals, and ranked two, three, five, twelve and thirteen respectively. Bonn, George S., "Science Technology Periodicals," Library Journal, 88(5), 954-8, March 1, 1963.

## CONCLUSION

The purposes of the American Chemical Society, like the purposes of the copyright law, are to promote progress in science. The eroding of the protection afforded under the copyright law will result in the retarding of the Society's efforts toward progress in science. The erosion caused by the Court of Claims' decision concerning "fair use" will be so swift that the Society cannot afford to accept that decision as a "holding position" until some undetermined date when the Congress takes appropriate action.

Accordingly, the Society reiterates its support of the petitioner and respectfully urges that the decision of the Court of Claims be reversed and remanded with directions to adopt the Trial Judge's opinion, findings of fact, and recommended conclusions of law as a basis for a judgment in favor of the petitioner.

Respectfully submitted,

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## APPENDIX A

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July 1, 1974

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Re: Williams & Wilkins v. The United States U. S. Supreme Court; Oct. Term, 1973 No. 73-1279

Dear Mr. Hanson:

Pursuant to your request, petitioner, The Williams & Wilkins Company, consents to the filing of a brief *amicus curiae* in the above matter by the American Chemical Society.

Sincerely yours,
/s/ ALAN LATMAN

## APPENDIX B

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

July 8, 1974

William J. Butler, Jr., Esq.
Hanson, O'Brien, Birney, Stickle
and Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: Williams & Wilkins Company v. United States,
No. 73-1279, October Term, 1973

Dear Mr. Butler:

In response to the request in your letter of July 5, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of the American Chemical Society.

Sincerely,

/s/ ROBERT H. BORK
Solicitor General